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PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional) AUS920000829US1	
I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)] on <u>June 16, 2006</u> Signature <u>Anne Vachon Dougherty</u> Fax to <u>(571) 273-8300</u> Typed or printed name <u>Anne Vachon Dougherty</u>		Application Number 09/737,368	Filed 12/15/2000
		First Named Inventor ULLMANN	
		Art Unit 2154	Examiner H. PATEL
Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request. This request is being filed with a notice of appeal. The review is requested for the reason(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided.			
I am the <input type="checkbox"/> applicant/inventor. <input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96) <input checked="" type="checkbox"/> attorney or agent of record. Registration number <u>30,374</u> <input type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34 _____		<u>Anne Vachon Dougherty</u> Signature <u>Anne Vachon Dougherty</u> Typed or printed name <u>(914) 962-5910</u> Telephone number <u>June 16, 2006</u> Date	
NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.			
<input checked="" type="checkbox"/> *Total of <u>1</u> forms are submitted.			

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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Claims 1-6, 11, 12, 15-20, 25-26, 28 and 30 have been rejected under 35 USC 102 as anticipated by Li. The Li patent is directed to a method for providing admission control (AC) for service requests based on bandwidth. Li defines "...an admit limit (AL) representing a bandwidth utilization capacity allocated to a service offered on the weakest link of the network". When a request for the service is received, the required bandwidth for the request is compared to the bandwidth utilization capacity for that service. If the required bandwidth exceeds the bandwidth utilization capacity, the request is rejected. The Li patent does not teach or suggest the invention as claimed. The present invention, as taught and claimed, provides a method, system, and program storage device for performing method steps for identifying slow links in a distributed network. Under the present invention, an original link speed factor is defined for each of the links in the distributed network. Li defines a bandwidth utilization capacity for a particular service based on the service using the weakest link in Li's network. Li does not define an original link speed factor for each link. The term "link speed" refers to a specific, measurable value, as set forth in the Specification on page 2, and does not encompass all possible values assignable to a network. Applicants assert that bandwidth capacity is not the same as link speed, for 102 or other purposes.

Li does not perform at least one runtime measurement of at least one runtime link speed indicator for each of a plurality of links. Li uses its original bandwidth capacity for a service throughout its operation. Li can "deduct" capacity from that value, based on acceptance of requests, but Li does not measure a runtime link speed indicator. Li compares all incoming requests, routed from the edge routers to the QoS manager, to the originally determined bandwidth utilization capacity for the requested service. The bandwidth capacity is determined based on an assumption that a particular link is the weakest link, and will always be the weakest link in the network. Li does not teach or suggest using speed to identify if a link is weak.

Li does not teach or suggest the step of calculating a runtime link speed factor based on runtime measurements. Li relies on the predefined bandwidth capacity and does not measure to dynamically assess runtime link speed. It cannot be concluded that Li calculates a runtime link speed factor using measurements if Li has not performed any measurements related to link speed. Li does not define an original link speed factor, does not measure runtime link speed and does not calculate a runtime link speed factor. Clearly, therefore, Li cannot then compare values which Li has not defined, measured, or calculated.

Anticipation under 35 USC 102 is established only when a single prior art reference discloses each and every element of a claimed invention. See: In re Schreiber, 128 F. 3d 1473, 1477,

44 USPQ2d 1429, 1431 (Fed. Cir. 1997); In re Paulsen, 30 F. 3d 1475, 1478-1479, 31 USPQ2d 1671, 1673 (Fed. Cir. 1994); In re Spada, 911 F. 2d 705, 708, 15 USPQ2d 1655, 1657 (Fed. Cir. 1990) and RCA Corp. v. Applied Digital Data Sys., Inc., 730 F. 2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir. 1984). Since the Li patent does not teach the claimed steps or means for defining an original link speed factor for each link, performing at least one runtime measurement for each link, calculating a runtime link speed factor for each link, and comparing the calculated runtime link speed factor to the original link speed factor, it cannot be concluded that Li anticipates the invention as claimed in independent Claims 1, 17 and 28, or the claims which depend therefrom (Claims 2-8, 18-22), or those claims which recite parallel limitations (Claim 15).

Applicants contend that the Li patent doesn't teach or suggest determining what specific applications require access to a detected slow link and adjusting application usage of the detected slow link by the specific applications. The Examiner has concluded that the Li passage, from the Abstract, which mentions "dynamic bandwidth adjustment" anticipates "dynamically adjusting application usage". The only dynamic bandwidth adjustment performed by Li is deducting required bandwidth for a request from the bandwidth utilization capacity when a request is accepted. Li teaches that requests are either accepted or rejected based on the bandwidth required for the request as

compared to the bandwidth utilization capacity which was predefined based on a predetermined weakest link in the network. Li does not teach or suggest adjusting application usage of links. Applicants reiterate that anticipation under 35 USC 102 can only be maintained if the reference teaches each and every claim feature. Li does not teach or suggest adjusting application usage, either by a system administrator or the application itself, in response to dynamic detection of slow links and does not anticipate the language of Claims 11-16, 25-27, 30, or those claims which also recite application-based response to detected slow links (Claims 4-6, 8, and 20).

Claims 7, 8, 13, 14, 21, 22, and 27 have been rejected under 35 USC 103 as unpatentable over Li in view of Ganz. Ganz is cited for its teachings related to an administrator identifying slow links and altering application usage of slow links. Ganz, like Li, looks to bandwidth capacity, which is not the same as or suggestive of link speed. Accordingly, the combination does not obviate the invention.

Claims 1-8, 11-22, 25-28, and 30 have been rejected under 35 USC 102 as anticipated by Chirashnya. The Chirashnya patent is directed to a system and method to detect faulty switch adapters. Chirashnya has multiple nodes transmit packets through a switch adapter which is to be tested and then detects, at the packet destination, whether a bad packet has been received. If a bad packet is detected, the source (i.e., the faulty switch adapter)

is identified. Alternatively, the packets arriving at the destination are counted, and a faulty switch adapter is identified if fewer packets arrived than were sent. The Chirashnya patent does not anticipate the invention as claimed since Chirashnya does not teach defining an original link speed factor for each link, performing at least one runtime measurement for each link, calculating a runtime link speed factor for each link, and comparing the calculated runtime link speed factor to the original link speed factor. Applicants reiterate that "link speed" is carefully chosen language which does not encompass all attributes for characterizing a network. The claimed invention expressly defines, measures, calculates and compares link speeds. In contrast, Chirashnya sends packets through a switch adapter and then counts or evaluates the integrity of packets at the destination. Since Chirashnya does not define an original link speed, does not perform runtime measurements of link speed indicators and calculate runtime link speeds based on those measurements, and does not compare original to runtime link speeds, it cannot be maintained that Chirashnya anticipates the language of independent Claims 1, 17 and 28, or the claims which depend therefrom and add limitations thereto (Claims 2-8, 18-22), or those claims which recite parallel limitations (Claim 15).